Supreme Court, U. S.
FILED
AUG 29 1975
MICHAEL RODAK, JR., CLERK

No. 75-321

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

R. L. SWEET LUMBER COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Charles E. Hoffhaus,
HILLIX, BREWER, HOFFHAUS,
GRIER & WHITTAKER
2715 Commerce Tower
Kansas City, Mo. 64105

Attorneys for Petitioner

August 25, 1975

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Question Presented for Review.	3
Statutory Provision Involved	3
Statement of the Case	4
Reasons for Granting the Writ.	9
Conclusion	17
Appendix A (Decision and Proposed Order of Administrative Law Judge)	1 App.
Appendix B (Decision and Order of National Labor Relations Board)	53 App.
Appendix C (Opinion of Court of Appeals for the Tenth Circuit).	55 App.
Appendix D (Judgment of Court of Appeals for the Tenth Circuit).	77 App.

AUTHORITIES

Cases	Page
Local No. 1424, International Machinists v. NLRB, 362 U.S.411 (1960) 4L.Ed. 2d 832, 80 S.Ct. 822	3, 11
NLRB v. Brown (CCA9, 1962), 310 F.2d 539.	17
Tennessee Products Chemical Corp. v. NLRB, (CCA6, 1970), 423 F2d 169	16

Statutes	
29 U.S.C.A. §160(b).	3

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. _____

R. L. SWEET LUMBER COMPANY,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

The petitioner, R. L. SWEET LUMBER COMPANY, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on June 5, 1975.

OPINIONS BELOW

The Decision and Proposed Order of the Administrative Law Judge, Case No. 17-CA-5292, John F. Corbley, Administrative Law Judge, is unreported and is printed in Appendix A, infra, pp. 1 - 52, App. (The Appendix("App.") is printed and paginated separately). The Decision and Order of the National Labor Relations Board is reported at 207 NLRB No. 89 and 1974 CCH NLRB ¶25,971 (see Appendix B, infra, pp. 53 - 54, App.). The Opinion of the Court of Appeals for the Tenth Circuit is reported at 515 F.2d 785 (see Appendix C. infra, pp. 55 - 76, App.).

JURISDICTION

The judgment of the Court of Appeals (see Appendix D, p. 77, App., infra) was entered on June 5, 1975. The jurisdiction of this Court is invoked under 28 U.S.C.A. §1254(1).

QUESTION PRESENTED FOR REVIEW

Does the continuing recognition and enforcement by an employer after the barred statutory limitations period, of a labor contract entered into with a union which did not represent a majority, as in this Court's 1960 Bryan decision cited infra, constitute an actionable unfair labor practice (or is this Court willing to allow Bryan to be ignored)?

STATUTORY PROVISION INVOLVED

Section 10(b) of the National Labor Relations Act, 29 U.S.C.A. §160(b), p.5, provides in pertinent part:

> That no complaint shall issue upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board [National Labor Relations Board] and the service of a copy thereof upon the person against whom such charge is made, unless the person aggrieved thereby was prevented from filing such charge by reason of service in the armed

forces, in which event the six-month period shall be computed from the day of his discharge.

STATEMENT OF THE CASE

Petitioner, R. L. Sweet Lumber Company, a Missouri corporation qualified to do business in Kansas (the "Company") has operated a lumber business since 1952 on Roe Boulevard in Kansas City, Kansas where, as well as selling lumber and other building materials, it has manufactured and sold millwork such as windows, doors and room dividers, and also single-package prefabricated homes. The prefab home manufacturing activity was known as the Standard Homes Division. It was not a separate legal entity until November 1971, at which time the name of an available subsidiary was changed to Standard Homes Company and the prefab equipment was sold to that subsidiary.

The prefab manufacturing employees at Roe Boulevard, some 16 in number, were members of Carpenters Local 1635 and were represented by the Carpenters' District Council of Kansas City and Vicinity, AFL-CIO, ("Union" or "Carpenters") in a separate unit. Seven or eight of these employees spent all or most of their time in prefabrication and assembly of the packaged homes. Another unit, composed of warehouse and yard employees (e.g., lumber handlers, truckdrivers, loaders, forklift operators, stockmen, etc.), was represented by Teamsters Local 541.

Because its prefab home operation at Roe Boulevard was cramped and inefficiently organized, the Company decided in about 1970 to build a new plant at Olathe, Kansas, about 19 miles away and the parties stipulated to the economic necessity

of this move. In January 1972, with the new plant almost completed, Standard Homes Company hired four new employees to work at the Olathe plant. (At least three of these initial four employees later worked on the production line for prefab homes at Olathe.) During their first month, before production started, these four men unloaded the initial lumber deliveries at Olathe and did carpentry work, building racks and other facilities preparatory to the manufacture of prefab homes.

On January 24, 1972, a business agent of Teamster Local 541 visited Olathe and obtained signed authorization cards from all four men and presented them to the Company. Standard Homes Company and Teamsters Local 541 executed a contract on February 11, 1972 (the "Olathe contract") which ran from February 7, 1972 until February 2, 1975, with a provision for

automatic renewal. The contract gave Local 541 representation over "all production and maintenance employees at the Employer's Olathe, Kansas, plant including truck drivers". One of its provisions required unit employees to join Local 541 after 31 days of employment.

By its later actions, including actions considerably more than six months after the signing of the Olathe contract, the Company (and its subsidiary Standard Homes Company) gave lawful recognition and enforcement to the Olathe contract by advising new production and maintenance workers that they were subject to the contract with Teamsters Local 541, checking off dues, paying the wage scale referred to therein, and in general adhering to the terms thereof. The Carpenters sought, and the Company declined, bargaining with respect to the Standard Homes production

workers in about February of 1972, and later Carpenters grievance and arbitration attempts were also rejected by Company, because of the binding effect of the Teamsters contract.

This proceeding was initiated by an unfair labor practice charge filed by the Carpenters and served on the Company on August 18, 1972 (six months and seven days after the date of signing the Olathe Teamsters contract). As hereinafter noted, the District Director dismissed the original charge, but it was later reinstated by direction from the National office. The case was heard before the U. S. Tenth Circuit Court of Appeals upon the application of the National Labor Relations Board pursuant to jurisdiction granted by Section 10(e) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. Sec. 151, et

seq.), for enforcement of its order issued against the Company on November 23, 1973. That Court had jurisdiction of the proceeding, the alleged unfair labor practices having occurred in the State of Kansas. Judgment was entered by the U. S. Tenth Circuit Court of Appeals on June 5, 1975 enforcing the aforesaid order of the NLRB against Company.

REASONS FOR GRANTING THE WRIT

The reasons for granting the writ are two:

(a) The Bryan NLRB statute of limitations case, decided by this Court on virtually identical facts, and cited infra, was not followed by the Court of Appeals, opening the way for burdensome disposition of a huge volume of otherwise time-barred unfair labor practice cases.

(b) The decision of the Tenth Circuit Court of Appeals is in conflict with

those of other circuits on the same issue, thereby inviting the exercise of this Court's power of supervision to foster uniformity.

This appeal assumes arguendo that (1) in early February, 1972 (pre-February 19) the Teamsters card-signers were in the minority insofar as the eventual unit was concerned, as in the Bryan case; (2) Standard Homes was the alter ego of the Company; (3) all work granted to the Teamsters by the contract of February 11, 1972 (i.e., all production and maintenance work) was work previously contracted to a certified union, Carpenters Local 1635 of the K. C. Carpenters District Council, as in the Bryan case; and (4) that the contract continued to be enforced and maintained by Company and Standard Homes after the six month limitations period, as in the Bryan case.

The Regional Director (who dismissed the original charge), the Law Judge, the Board and the Court of Appeals all agreed with Company that the recognition of, and execution of a contract with, the Teamsters at the Olathe plant are not actionable because these two actions are barred because of this Court's ruling in Bryan. The only dispute is over later enforcement.

The issues herein were all decided by this Court in Local No. 1424, International Machinists v. NLRB, 362 U.S. 411 (1960) 4 L.Ed. 2d 832, 80 S. Ct. 822, commonly known as the Bryan Manufacturing Company case. The Bryan case dealt with the application of Section 10(b) of the National Labor Relations Act, as amended, 61 Stat. 146, 29 U.S.C. §160(b) which provides, in pertinent part, as follows:

> "Provided, that no complaint shall issue based upon any unfair labor practice occurring more than six

> months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made***" (Emphasis supplied)

This Court cited the legislative history of the Section to the effect that it was designed to bar litigation over past events "after records have been destroyed, witnesses have gone elsewhere, and recollections of the events in question have become dim and confused" (l.c. 419).

In the Bryan case, this Court made it clear that events barred by the limitation cannot be used to "taint" later events which are not, in and of themselves (and without reference to barred unfair practices), unfair.

Yet the Court below, ignoring this prohibition, felt free to look at later hirings and enforcement of Teamsters' wages, check-off, pension, and other contract terms in isolation, even though pre-

dicated on the barred contract. This Court thoroughly explored this issue in the Bryan case, and succinctly stated that (l.c. 423):

> "In any real sense, then, the complaints in this case are 'based upon' the unlawful execution of the agreement, for its enforcement, though continuing, is a continuing violation solely by reason of circumstances existing only at the date of execution. To justify reliance on those circumstances on the ground that the maintenance in effect of the agreement is a continuing violation is to support a lifting of the limitations bar by a characterization which becomes apt only when that bar has already been lifted. Put another way, if the §10(b) proviso is to be given effect, the enforcement, as distinguished from the execution, of such an agreement as this constitutes a suable unfair labor practice only for six months following the making of the agreement." (Emphasis is the Court's).

Standing alone, Company's acts were totally innocuous and it is only by lifting the bar and finding the inception of the agreement to be an unfair labor practice

that the General Counsel seeks to challenge them.

The Court below suggests that Bryan can be selectively applied because the original minority union was not a representative complement as to the prefab employees. The avowed purpose of the NLRB, according to its counsel, was to splinter off from the Bryan case situations (such as here) where the barred contract was made with a "minority" union. Would this Court allow Bryan thus to be distinguished and rendered ineffective? This would open the floodgates to time-barred labor litigation!

The factual background revealed by the appellate history of the Bryan case shows that the majority Bryan employees (the U.A.W. adherents) were in the same relative position as the complaining Carpenters here and the issue was decided against the U.A.W. and for the minority union (Machin-

ists). If the "complement" was "not representative," that very situation obtained on February 11, 1972 when the Teamsters' contract was signed. (Actually, there was a representative complement since at least three of the original four Teamsters card signers later worked as production workers on the line.)

The whole thrust of Bryan was to protect companies in time-barred minority union situations such as this. In Bryan, this Court said (l.c. 425, f.n.16):

> "16. The immediate impetus of the legislation was the pendency of an NLRB proceeding involving a closed-shop agreement in effect at the Kaiser shipbuilding yards in Portland, Oregon. The agreement, though executed at a time when only 66 workers were employed, was being applied to a 20,000-man work force. The debates show that the issue of representation by minority unions was in the forefront of legislative concern." (Emphasis supplied)

The Bryan case dealt with an extreme minority union situation. As Mr. Justice

Whittaker pointed out in his dissent (l.c. 433, f.n.1):

> "In fact the undisputed testimony was that the union did not then represent a single one of the employees, and that the employer acceded to the union's demand for recognition and entered into the contract simply because the union had it 'over a barrel'" (Emphasis supplied.)

The other Circuit Courts of Appeal have uniformly followed the holding of this Court in the Bryan case. Typical of these cases is the opinion of the Sixth Circuit in Tennessee Products Chemical Corp. vs. NLRB, 423 F.2d 169 (CCA6 1970), dealing with enforcement of a time-barred contract similar to that in the instant case, and following Bryan, supra. In that case, as here, the employer was alleged to have contracted with a minority union which did not actually represent the employees in the unit at the time of the contract. That minority non-representative condition con-

tinued, but the Court refused to apply a "continuing violation" theory after the barred period. The Court said (l.c. 180):

> "The charge of violation of Section 8(a)(1) and (2) was not made until July 1, 1965, almost a year after the accused contract or contracts of July 16, 1964. If there was a violation, that is the date it occurred. The assertion of the Board that the contract, to run for three years, was a continuing violation, was considered and disposed of by the Supreme Court's opinion in [Bryan] (citing the quotation, supra, from p.423 of the Bryan case).

To like effect (§10(b) running from date of contract) was NLRB vs. Brown, (CCA 9, 1962), 310 F.2d 539.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this peti-

tion for a writ of certiorari should be granted.

August 25, 1975.

HILLIX, BREWER, HOFFHAUS,
GRIER & WHITTAKER

By _____
Charles E. Hoffhaus
2715 Commerce Tower
Kansas City, Mo. 64105
Phone: (816) 221-0355
Attorneys for Petitioner.